SHEARN DELAMORE & CO & ANOR

v.

JOSEPH LEE HENN SHEN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-03-13-1996]
2 JULY 1998

CONTRACT: *Agency - Principal and agent - Claim for money had and received - Duty of agent - Contracts Act 1950, ss. 145, 171*

CIVIL PROCEDURE: *Third party proceedings - Whether claim sustainable - Whether arguable case shown*

CIVIL PROCEDURE: *Jurisdiction - Contract - Breach of - Whether cause of action arose within local jurisdiction of the High Court in Malaya*

CIVIL PROCEDURE: *Jurisdiction - Contract - Agency contract - Breach of - Whether High Court in Malaya had jurisdiction to try claim*

The plaintiffs had appointed the defendants/appellants as their solicitors in respect of the arrest and foreclosure of two vessels in Labuan, Sabah. Being West Malaysian solicitors, the defendants appointed the respondent herein ('the third party') as their local advocate on record in the conduct of the proceedings, and consequently, admiralty suits *in rem* were filed by the third party in the High Court at Kota Kinabalu for the foreclosure of the vessels. The plaintiffs made a successful bid at the auction sale of the vessels, but complained that they had suffered losses resulting from the defendants' failure to advise them on the chargeability of the auctioneer's commission in respect of the sale. The plaintiffs also alleged that the third party, as the defendants' sub-agent, had misappropriated RM1,350,595.20 from the proceeds of the sale. By a summons dated 24 May 1994 filed in the High Court at Kuala Lumpur, the plaintiffs sued the defendants and claimed damages for non-advice aforesaid, and for the refund of moneys allegedly misappropriated by the third party. It was not in dispute that in so claiming, the plaintiffs relied *inter alia* on s. 145(2) of the Contracts Act 1950 ('the Act').

The defendants pleaded in their defence and counter claimed that the plaintiffs' claim must fail as the third party was not their sub-agent but an agent of the plaintiffs, and that the plaintiffs, therefore, ought to have sued the third party for the misappropriation or for the said failure to advise. In the meanwhile the defendants commenced third party proceedings against the third party seeking damages and indemnity in the event that they were held liable to the plaintiffs.

The third party sought to set aside the third party notice under O. 16 Rules of the High Court 1980 ('RHC'), and argued that the tort of misappropriation, if at all, had taken place in Sabah, and the High Court in Malaya, therefore, had no jurisdiction to entertain the claim against him. The court set aside the third party notice and the defendants appealed.

Before the learned appellate judges, questions *inter alia* arose as to (i) whether the cause of action for money had and received between the plaintiffs and the defendants here arose within the local jurisdiction of the High Court in Malaya; and in any case (ii) whether the High Court in Malaya at Kuala Lumpur had the local jurisdiction to try the claim by the defendants against the third party in the third party action.

Held:

Per NH Chan JCA (majority)

[1] All that the defendants needed to show at this juncture was that they had an arguable case to sustain their claim in the third party notice that, should the plaintiffs succeed against them, they could claim indemnity or for money had and received from the third party.

[2] Bearing in mind s. 171 of the Act, under which this action was brought, the third party was bound to pay to his principal the defendants all sums which the third party had received on the defendants' behalf.

[3] By virtue of s. 50 of the Act, since no place has been specified for the performance of the statutory promise by the third party to pay, his duty was to apply to the defendants to name a place for payment to be made, and to pay it to them at that place. Section 50 of the Act does not however mean that it was for the third party to choose the venue for the payment to be made to the defendants. It was for the defendants to name the place.

[3a] The defendants here had asked to be paid in Kuala Lumpur and payment must therefore be made at the defendants' address in Kuala Lumpur. There was therefore a cause of action for breach of an agency contract which was in Malaya, namely, that the money had not been paid over to the defendants at their office at Kuala Lumpur.

[4] On the facts, s. 50 of the Act also applied to the other cause of action in the third party notice, ie, on the third party's failure to advise the defendants of the obligation to pay the auctioneer's commission.

[5] This appeal must therefore be allowed, with the result that the application under O. 16 r. 6 of the RHC to set aside the third party notice is dismissed. In any case, the defendants need only show that there were triable issues, that they had an arguable case and that their causes of action against the respondent arose within the local jurisdiction of the High Court in Malaya, which they successfully did.

Per Abu Mansor Ali JCA (majority)

[1] It was the duty of the third party to account and pay the disputed sum to the defendants in Kuala Lumpur. The failure of the third party to pay over what ought to be accounted for resulted in the breach of the agency contract in Kuala Lumpur.

[2] The Sabah work of the third party should not be looked at in isolation. This transaction must be looked at as a whole. Clearly, therefore, the judge's judgment that the third party's work on behalf of the defendants be looked at as an independent action and that the third party was agent of the plaintiffs and that the defendants were merely an intermediary, could not be subscribed to. To do that would be to deny what was clear ie, that it was the plaintiffs who engaged the defendants and the defendants constituted the third party as their agent. The appeal ought to be allowed.

Per Abdul Malek Ahmad JCA (dissenting)

[1] The third party was the solicitor for the plaintiffs and not the defendants. The funds came from the plaintiffs and the defendants' role was basically one of intermediary. Accordingly, the plaintiffs should have filed the action in Sabah as: (i) the third party is an advocate and solicitor in Sabah; (ii) the admiralty actions the third party had filed for the plaintiffs on the instructions of the defendants took place in Sabah; (iii) the refund from the Sheriff and the set off for the fees due to the third party occurred in Sabah; (iv) the alleged misappropriation took place in Sabah; and in any case (v) the third party was governed by the Advocates Ordinance of Sabah.

[2] In the exchange of affidavits between the parties following the third party proceedings, there had been a change of stance by the defendants. Whereas in their affidavit dated 14 September 1994, the defendants alluded their claim to the third party's breach of duties in that he misappropriated the sum of RM1,350,595.20, the defendants, by the affidavit of 15 December 1994, stated that they had commenced third party proceedings claiming indemnity based on the third party's breach of duty **not only** for wrongfully misappropriating the said money, but also for his failure to remit and pay over the said monies to the defendants for onward transmission to the plaintiffs.

[2a] It was clear that the cause of action against the third party was for wrongful retention and misappropriation, and the failure to advise, and all these acts occurred in Sabah. Although in their affidavit of 15 December 1994, it was contended that the third party, as agent, must look for the defendants, as principals, in Kuala Lumpur to remit and pay moneys for onward transmission to the plaintiffs, that affidavit should be disregarded. It was obvious that the primary purpose of the additional words in the subsequent affidavit by the defendants was to bolster up their case on the issue of jurisdiction.

[3] Since all the acts occurred in Sabah, the plaintiffs should have cited the defendants as the first defendant and the third party as the second defendant and filed the action in Sabah. This appeal should therefore be dismissed.

[Appeal allowed by majority.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif-plaintif telah melantik defendan sebagai peguamcara mereka berhubung dengan penangkapan dan halangtebus dua buah kapal di Labuan, Sabah. Defendan tersebut, sebagai peguamcara di Malaysia Barat, telah melantik responden di sini ('pihak ketiga') sebagai peguambela tempatan mereka menurut catatan bagi mengendalikan prosiding tersebut, dan berikutan itu, guaman-guaman admiralti *in rem* telah difailkan oleh pihak ketiga tersebut dalam Mahkamah Tinggi di Kota Kinabalu untuk halangtebus kapal-kapal tersebut. Plaintif-plaintif telah berjaya membuat tawaran di perlelongan kapal-kapal tersebut, tetapi mengadu bahawa mereka telah mengalami kerugian yang diakibatkan oleh kegagalan defendan untuk menasihatkan mereka mengenai komisyen pelelong yang boleh dkenakan berhubung dengan penjualan tersebut. Plaintif-plaintif tersebut juga mendakwa bahawa sebagai sub-ejen defendan, pihak ketiga telah melesapkan RM1,350,595.20 daripada hasil jualan tersebut. Dalam keadaan yang sedemikian, melalui saman bertarikh 24 Mei 1994 yang

telah difailkan dalam Mahkamah Tinggi di Kuala Lumpur, plaintif-plaintif telah mendakwa defendan-defendan dan menuntut gantirugi bagi ketiadaan nasihat yang tersebut di atas dan untuk mendapatkan kembali wang yang didakwa telah dilesapkan oleh pihak ketiga tersebut. Adalah tidak dipertikaikan bahawa dalam membuat tuntutan yang sedemikian, plaintif-plaintif telah bergantung antara lainnya pada s. 145(2) Akta Kontrak 1950 ('Akta tersebut'). Defendan-defendan memplid dalam pembelaan dan tuntutan balas mereka bahawa tuntutan plaintif seharusnya ditolak kepada pihak ketiga tersebut bukannya sub-ejen mereka tetapi merupakan seorang ejen plaintif-plaintif, dan bahawa plaintif-plaintif, dengan itu, seharusnya telah mendakwa pihak ketiga tersebut bagi pelesapan atau pun bagi kegagalan menasihatkan yang tersebut di atas. Sementara itu defendan-defendan telah memulakan prosiding pihak ketiga terhadap pihak ketiga tersebut untuk cuba mendapatkan gantirugi dan tanggunganrugi sekiranya mereka bertanggungjawab kepada plaintif-plaintif.

Pihak ketiga tersebut cuba untuk mengenepikan notis pihak ketiga di bawah A. 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('RHC'), dan berhujah bahawa tort pelesapan, jika ada, telah berlaku di Sabah, dan Mahkamah Tinggi di Malaya, dengan itu, tidak mempunyai bidangkuasa untuk melayan tuntutan terhadapnya. Hujahan ini mendapat perhatian hakim yang bijaksana, yang kemudiannya telah menolak hujahan defendan-defendan bahawa kausa tindakan plaintif, yang mana termasuk kausa tindakan terhadap defendan-defendan dan pihak ketiga, telah berbangkit di Kuala Lumpur menurut fakta bahawa wang tersebut seharusnya dibayar ke dalam akaun defendan-defendan di Kuala Lumpur dan telah tidak diterima, yang mana mengakibatkan kemungkiran itu berlaku di Kuala Lumpur. Begitu juga, penegasan defendan-defendan berhubung pemakaian prinsip am bahawa ejen tersebut seharusnya mencari pihak prinsipal atau pihak utama dan membayarnya di Kuala Lumpur, memandangkan ketiadaan sebarang peruntukan nyata mengenai tempat atau cara pembayaran dalam kontrak tersebut, telah juga ditolak oleh hakim yang bijaksana. Notis pihak ketiga defendan dengan itu telah juga diketepikan oleh mahkamah, di mana selepas itu defendan-defendan telah merayu.

Di hadapan hakim yang bijaksana, persoalan-persoalan berbangkit antara lainnya berhubung dengan: (i) samada kausa tindakan untuk wang yang dipunyai dan diterima antara plaintif dan defendan-defendan berbangkit di dalam lingkungan bidangkuasa tempatan Mahkamah Tinggi Malaya; dan dalam sebarang keadaan (ii) samada Mahkamah Tinggi Malaya di Kuala Lumpur mempunyai bidangkuasa tempatan untuk membicarakan tuntutan tersebut oleh defendan-defendan terhadap pihak ketiga dalam tindakan pihak ketiga tersebut.

Diputuskan:
Oleh NH Chan HMR (majoriti)

[1] Apa yang defendan-defendan perlu menunjukkan di peringkat ini adalah bahawa mereka mempunyai kes yang boleh dihujahkan untuk mempertahankan tuntutan mereka dalam notis pihak ketiga bahawa, sekiranya plaintif-plaintif berjaya terhadap mereka, mereka boleh menuntut tanggunganrugi atau untuk mendapatkan wang yang dipunyai dan diterima daripada pihak ketiga.

[2] Memikirkan s. 171 Akta tersebut, di bawah yang mana tindakan ini telah dimulakan, pihak ketiga tersebut adalah tereikat untuk membayar kepada pihak utamanya, defendan-defendan tersebut, kesemua wang yang telah diterima oleh pihak ketiga bagi pihak defendan-defendan.

[3] Menurut s. 50 Akta tersebut, oleh kerana tidak disebut tempat yang telah ditetapkan untuk perlaksanaan janji berkanun oleh pihak ketiga untuk membayar, kewajipannya adalah untuk memohon kepada defendan-defendan bagi mendapatkan nama tempat di mana pembayaran harus dibuat, dan membuat pembayaran tersebut kepada mereka di tempat itu. Seksyen 50 namun begitu tidak bermaksud bahawa ianya terpulang kepada pihak ketiga untuk memilih tempat untuk membuat pembayaran itu kepada defendan-defendan. Ianya terpulang kepada defendan-defendan untuk membuat pilihan tempat.

[3a] Defendan-defendan di peringkat ini telah meminta supaya pembayaran dibuat di Kuala Lumpur dan oleh itu pembayaran semestinya dibuat di alamat defendan-defendan di Kuala Lumpur. Dengan itu terdapat satu kausa tindakan bagi kemungkiran akan sebuah kontrak ejensi yang berlaku di Malaya, iaitu, bahawa wang tersebut telah tidak dibayar kepada defendan-defendan di pejabat mereka di Kuala Lumpur, Malaya.

[4] Berdasarkan fakta-fakta s. 50 juga terpakai kepada kausa tindakan yang lain dalam notis pihak ketiga, ia itu ke atas kegagalan pihak ketiga untuk menasihatkan defendan-defendan mengenai kewajipan mereka untuk membuat pembayaran bagi komisyen pelelong.

[5] Rayuan ini mestilah dengan itu dibenarkan, dengan keputusan bahawa permohonan di bawah A. 16 k. 5 KMT untuk mengenepikan notis pihak ketiga ditolak. Dalam sebarang keadaan, defendan-defendan hanya perlu menunjukkan bahawa terdapatnya isu-isu yang boleh dibicarakan, bahawa mereka mempunyai kes yang boleh dihujahkan dan bahawa kausa tindakan mereka terhadap responden berbangkit di dalam lingkungan bidangkuasa tempatan Mahkamah Tinggi Malaya, yang mana telah berjaya mereka lakukan.

Oleh Abu Mansor Ali HMR (majoriti)

[1] Ianya merupakan tugas pihak ketiga untuk mengambilkira dan membayar jumlah yang dipertikaikan itu kepada defendan-defendan di Kuala Lumpur. Kegagalan pihak ketiga untuk membuat pembayaran akan apa yang sepatutnya diambilkira telah menyebabkan kemungkiran kontrak ejensi di Kuala Lumpur.

[2] Kerja Sabah pihak ketiga tidak seharusnya dipandang sendirian. Transaksi ini semestinya dipandang secara keseluruhannya. Dengan itu, adalah jelas, penghakiman hakim bahawa kerja pihak ketiga bagi pihak defendan-defendan hendaklah dilihat sebagai satu tindakan bebas dan bahawa pihak ketiga adalah ejen plaintif-plaintif dan bahawa defendan-defendan adalah semata-mata merupakan orang tengah sahaja, tidak boleh diambilkira. Melakukan sedemikian adalah bertindak menafikan apa yang jelas bahawa ianya merupakan plaintif-plaintif yang telah melantik defendan-defendan tersebut dan defendan-defendan membentuk pihak ketiga sebagai ejen mereka. Rayuan tersebut seharusnya ditolak.

Oleh Abdul Malek Ahmad HMR (menentang)

[1] Pihak ketiga adalah peguamcara bagi pihak plaintif-plaintif dan bukan defendan-defendan. Dana-dana tersebut datangnya daripada plaintif-plaintif dan peranan defendan-defendan adalah hanya pada asasnya sebagai orang tengah sahaja. Sehubungan itu, plaintif-plaintif seharusnya telah memfailkan tindakan tersebut di Sabah kerana (i) Pihak ketiga adalah merupakan peguamcara dan peguambela yang bertempat di Sabah; (ii) tindakan admiralti yang telah difailkan oleh pihak ketiga bagi pihak plaintif-plaintif atas arahan defendan-defendan telah berlaku di Sabah; (iii) bayaran balik daripada Syerif dan penolakan bagi yuran yang kena dibayar kepada pihak ketiga telah berlaku di Sabah; (iv) pelesapan yang didakwa telah berlaku di Sabah, dan dalam sebarang kes; dan (v) Pihak ketiga telah dikuasai oleh Ordinan Peguambela, Sabah.

[2] Dalam pertukaran afidavit-afidavit antara pihak-pihak tersebut berikutan dengan prosiding pihak ketiga, telah terdapat perubahan pendirian oleh defendan-defendan. Sedangkan dalam afidavit mereka bertarikh 14 September 1994, defendan-defendan telah menolak tuntutan mereka kepada kemungkiran kewajipan pihak ketiga iaitu beliau telah melesapkan jumlah sebanyak RM1,350,595.20, defendan-defendan melalui afidavit bertarikh 15 Disember 1994 menyatakan bahawa telah memulakan prosiding pihak ketiga yang menuntut tanggunganrugi berdasarkan kemungkiran kewajipan pihak ketiga **bukan sahaja** bagi kesalahan melesapkan wang tersebut, tetapi juga atas kegagalannya untuk meremitkan dan membayar wang tersebut kepada defendan-defendan untuk dikemukakan selanjutnya kepada plaintif-plaintif.

[2a] Adalah jelas bahawa kausa-kausa tindakan terhadap pihak ketiga adalah penahahan secara salah dan pelesapan dan juga kegagalan untuk menasihat, dan kesemua perbuatan-perbuatan ini telah berlaku di Sabah. Walaupun dalam afidavit mereka bertarikh 15 Disember, 1994, telah ditegaskan bahawa pihak ketiga sebagai ejen mestilah mencari defendan-defendan sebagai prinsipal-prinsipal di Kuala Lumpur untuk meremit dan membayar wang untuk dikemukakan selanjutnya kepada plaintif-plaintif, afidavit itu seharusnya tidak dihiraukan. Ianya jelas bahawa tujuan utama perkataan tambahan dalam afidavit yang berikutnya oleh defendan-defendan adalah untuk merangsang kes mereka atas isu bidangkuasa.

[3] Oleh kerana kesemua perbuatan-perbuatan itu berlaku di Sabah, plaintif-plaintif seharusnya menyebut defendan-defendan sebagai defendan pertama dan pihak ketiga sebagai defendan ke-2 dan memfailkan tindakan tersebut di Sabah. Rayuan ini seharusnya dengan itu ditolak.

[Rayuan dibenarkan oleh keputusan majoriti.]

Cases referred to:

Charles Duval & Co Ltd v. Gans & Anor [1904] 2 KB 685 ***(refd)***
De Bussche v. Alt [1878] 8 Ch D 286 ***(refd)***
Distillers Co (Bio-Chemicals) Ltd v. Thompson [1971] 1 All ER 694 ***(refd)***
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 ***(refd)***
Harsant v. Blaine, Macdonald & Co [1887] 56 LJ QB 511 ***(foll)***
Johnson v. Taylor Bros & Co Ltd [1920] AC 144 ***(refd)***
Lam Kok Trading Co (Pte) Ltd & Anor v. Yorkshire Switchgear & Engineering Co Ltd [1976] 1 MLJ 239 ***(refd)***
Powell & Thomas v. Evan Jones & Co [1905] 1 KB 11 ***(refd)***
Rein v. Stein [1892] 1 QB 753 ***(refd)***
The Eider [1893] P 119 ***(refd)***
The King v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex p Princess Edmond De Plognac [1917] 1 KB 486 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 50, 143, 145(1), (2), (3), 146, 147, 171
Courts of Judicature Act 1964, s. 23(1)(a)
Federal Constitution, art. 121
Rules of the High Court 1980, O. 16 r. 6

Other source referred to:

Halsbury's Laws of England, 4th edn, p 467, para 783

For the appellants - K Anantham (CL Wong with him); M/s Skrine & Co
For the respondent - RR Sethu; M/s RR Sethu

[Appeal from High Court, Kuala Lumpur; Suit No: D1-22-531-1994]

Reported by WA Sharif

JUDGMENT

NH Chan JCA:

Introduction

The plaintiffs (the United States of America) were the mortgagees of two ships named "JADE PHOENIX' and "GOLDEN PHOENIX" and they have engaged the defendants (Messrs Shearn Delamore & Co. and Drew & Napier) to act as their solicitors in the arrest and foreclosure of the two vessels which were at the time laid-up off the port of Labuan in Sabah, East Malaysia.

As the defendants are a firm of advocates and solicitors practising only in West Malaysia, the plaintiffs have alleged in their statement of claim that they have consented to the defendants employing the third party Mr Joseph Lee Henn Shen of his law firm of Messrs Joseph Lee & Co. in Sabah, East Malaysia as sub-agent of the defendants.

Under the Contracts Act 1950 an agent cannot employ a sub-agent *(delegatus non protest delegare)* unless by the ordinary custom of a trade or from the nature of the agency, a sub-agent may or must respectively be employed: see s. 143 of the Contracts Act 1950 which reads:

> 143. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

In the present case, however, the plaintiffs have alleged that the defendants had express authority from the plaintiffs to employ a sub-agent which authority had been exercised by the defendants employing the third party as sub-agent. Thus s. 145(2) and (3) of the Act applies. The subsections read:

> 145(2). An agent is responsible to the principal for the acts of the sub-agent.
>
> (3). A sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

In reality, the agent's responsibility to his principal for the acts of a sub-agent is the same (as in sub-ss. (2) and (3) of s. 145) even where the sub-agent is appointed by the agent without the authority of the principal to do so: see s. 146 which reads:

> 146. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards that person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

The only difference is, under s. 146 the agent is responsible for the unauthorised sub-agent's acts both to the principal and to third persons, and under s. 145(1) the principal is responsible for and bound by an authorised sub-agent's acts with regard to third persons.

In English contract law (which is common law as distinct from statute law) privity of contract arises between the principal and the sub-agent (*De Bussche v. Alt* [1878] 8 Ch. D 286; *Powell & Thomas v. Evan Jones & Co.* [1905] 1 KB 11) where there is express or implied authority from the principal for the agent to employ a sub-agent. The agent in this country unlike that in the United Kingdom is solely responsible to the principal for the acts of the sub-agent (s. 145(2)), and the sub-agent is only responsible for his acts to the agent but not to the principal (s. 145(3)). In other words, in our law there is no privity of contract between the principal and the sub-agent so as to treat the sub-agent as if he were an agent originally appointed by the principal.

It is against this background that the plaintiffs have brought their action in the present case in the High Court in Malaya at Kuala Lumpur against the defendants for the moneys which the plaintiffs claimed belonged to them and which should have been paid over to them but which have been misappropriated or retained by the defendants' sub-agent.

The defendants' defence (to put it in a nutshell) is that Mr Joseph Lee Henn Shen was not a sub-agent of the defendants but an agent of the plaintiffs. In short, the defendants rely on s. 147 of the Contracts Act, which reads:

> 147. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, that person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.
>
> **ILLUSTRATIONS**
>
> (a) A directs B, his advocate, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.
>
> (b) A authorizes B, a merchant in Taiping, to recover the moneys due to A from C & Co. B instructs D, an advocate, to take legal proceedings against C & Co for the recovery of the money. D is not a sub-agent, but is advocate for A.

If the defendants are right with the defence under s. 147 then Mr Joseph Lee was not a sub-agent, but was the plaintiffs' agent. In which case, the plaintiffs should have sued Mr Joseph Lee and not the defendants and their claim against the defendants would fail.

On the other hand if the plaintiffs are right in their claim against the defendants under s. 145(2) then the defendants are responsible to the plaintiffs for the acts of Mr Joseph Lee. In which case, the defendants will have to look to Mr Joseph Lee for indemnity under s. 145(3)

The defendants took out a third party notice so as to claim from Mr Joseph Lee an indemnity or (more appropriately) for money had and received should the plaintiffs succeed in their claim against the defendants. This is how it was put by Mr Cecil Abraham (a partner of the defendants) in his affidavit (at pp. 149, 150 of the appeal record):

> 6. It is disputed that the Third Party's contract of retainer with the Defendants was concluded in Sabah. I further state that the Defendants' cause of action in the third party proceedings arose in Kuala Lumpur within the local jurisdiction of this Honourable Court for the following reasons:-
>
> (a) the Third Party's breach of contract and/or duty in failing to remit and pay over the monies in the sum of RM1,350,595.20 arose in Kuala Lumpur as the said Third Party was obligated to remit and pay over the said monies to the Defendants at their office at No. 2 Benteng, Kuala Lumpur for onward transmission to the Plaintiffs;

Mr Joseph Lee applied to set aside the third party notice under O. 16 r. 6 of the Rules of the High Court on the ground that the High Court in Malaya had no jurisdiction to entertain the claim against him because the cause of action did not arise within the local jurisdiction of the Malayan High Court. The third party notice was set aside by the Deputy Registrar whose decision was affirmed by the judge below. The defendants then appeal to this court.

The Appeal

The way to approach this appeal, as I see it, is to keep the discussion within the confines and context of the issues in hand in the appeal so that the right perspective is kept in the forefront. Everything that I am about to say in the appeal hereafter is based on the assumption that the plaintiffs had succeeded at the trial against the defendants under s. 145(2) of the Contracts Act. The third party proceedings were taken as a precautionary measure by the defendants should the plaintiffs succeed in establishing at the trial that Mr Joseph Lee was a sub-agent of the defendants.

On the other hand, should the defendants succeed in their defence under s. 147 of the Act then, of course, that would be the end of the case. The plaintiffs' action would be dismissed and so would the defendants' claim against the third party be dismissed, possibly with costs to be borne by the plaintiffs.

Whatever the outcome of the trial of the action may turn out to be, here is not the time and place to determine who were right. That will have to be decided at the trial. It is premature at this stage of the proceedings to decide in the appeal here that the third party was not a sub-agent of the defendants but an agent of the plaintiffs and that therefore the instant appeal should be dismissed with the result that the third party notice is set aside.

In the instant case, the application to set aside the third party notice was made on the ground that the High Court in Malaya lacks the local jurisdiction to try the defendants' claim against Mr Joseph Lee. The question of whether Mr Lee was actually the agent of the plaintiffs or the sub-agent of the defendants is not an issue to be determined here but it is in issue at the trial. The issue to be decided here in the instant appeal is whether the cause of action for money had and received arose within the local jurisdiction of the High Court in Malaya. We must be mindful of that always. All that the defendants need to show at this juncture is that they have an arguable case to sustain their claim in the third party notice that should the plaintiffs succeed against them, they could claim indemnity or for money had and received from the third party.

It is with these considerations in mind that I will now address the appeal.

Before us in the Court of Appeal, it was argued by Mr R.R. Sethu for the respondent Mr Joseph Lee that if there was any misappropriation at all it must have taken place in Sabah, East Malaysia where Mr Lee had his law firm and where he was a practising advocate and solicitor. The tort, if any, was committed within the local jurisdiction of the High Court in Sabah and Sarawak, East Malaysia so that the High Court in Malaya had no jurisdiction over the claim made against him in the third party notice: see art. 121 of the Federal Constitution and s. 23(1)(a) of the Courts of Judicature Act 1964.

Even assuming that the respondent had refused to perform the contract in its entirety (by misappropriating the money which he had no right to do under s. 171 of the Contracts Act), it would be open to the appellants not to put an end to the contract by treating it as alive and continuing. This means that they could sue for breach of the statutory term (s. 171) of the contract (to pay to the appellants all sums which the respondent had received on their behalf) in an action for money had and received. See s. 40 of the Contracts Act 1950 which reads:

> 40. When a party to a contract has refused to perfom, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

In other words, the appellants could either accept the repudiation of the agency contract by the respondent's conversion of the money and put an end to the contract (in which case they could sue in the High Court in Sabah and Sarawak for damages for conversion as the tort was committed there) or they could ignore the tort by treating the contract as alive and subsisting (in which case they could sue for money had and received).

There is only one issue in the instant appeal. It is whether the High Court in Malaya at Kuala Lumpur has the local jurisdiction to try the claim by the appellants against the respondent in the third party action. Section 23(1)(a) of the Courts of Judicature Act says that the High Court shall have jurisdiction to try all civil proceedings where the cause of action arose within the local jurisdiction of the court. To answer the question, we needs to be clear on what the cause of action is.

I have already referred to s. 145(3) of the Contracts Act which says that a sub-agent is responsible for his acts to the agent, but not to the principal. It is for this reason that the claim is made by the appellants against the respondent in the third party notice. Section 171 of the same Act states:

> 171. Subject to the deductions specified in section 170, the agent is bound to pay to his principal all sums received on his account.

Therefore, in the instant case, the sub-agent (the respondent) is responsible to the agent (the appellants) but not to the principal (the plaintiffs) and is therefore bound to pay to the appellants all sums received on their account. See *Harsant v. Blaine, Macdonald & Co.* [1887] 56 LJ QB 511, CA, where Lindley LJ said, at 513:

> There is a certain class of persons, such as agents, who are bound to account to their principals, and to hand over to such principals any money which they may have belonging to them.

See also *1 Halsbury's Laws of England,* 4th Edn., p. 467, para. 783, which reads:

> All moneys received on the principal's behalf must be paid over or accounted for to the principal upon request, unless the agent has for some lawful reason repaid them to the person from whom he received them. It is immaterial that the transaction in respect of which the moneys are received is void or illegal, provided that the agency itself is not illegal. Nor can the agent retain such moneys against the principal in respect of a debt due to himself from the person paying them, or because of some claim made to them by some third person. Failure to pay renders the agent liable to an action for money had and received.

Section 171 of the Contracts Act says that "the agent is bound to pay to his principal all sums received on his account." This means that the respondent (as the appellants' sub-agent) is bound to pay to the appellants (as the respondent's principals) all sums which the respondent had received on the appellants' behalf.

This brings us to the next question, which is, where must the money be paid?

In *Rein v. Stein* [1892] 1 QB 753, Kay LJ said, at p. 758:

> *Prima facie* in commercial transactions when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on business.

In *The Eider* [1893] P. 119, Lord Esher M.R. said, at p. 131:

> The parties to that contract are now abroad, and neither the plaintiffs nor defendants are now in England. The contract is to perform work to that ship; whether it be called salvage work or not, seems to be immaterial. It is for work to be done to that ship, and payment is to be made for that work. There is no place specified in the contract for the payment. What, then, is the ordinary rule? That the debtor must follow his creditor, and must pay where his creditor is. If this were a contract made in England, by two people who were at the time in England, and payment was to be made in England, nevertheless, if the creditor went abroad and was abroad at the time payment was to be made, the debtor need not go after his creditor to pay him abroad; he may wait till his creditor comes back to England. The case of *Fessard v. Mugnier* 18 CB (NS) 286 shows that absence of the creditor from England affords an excuse for the want of tender or payment by the debtor where the creditor has gone abroad after the making of the contract, but nevertheless the proper place of payment is determined by the rule that the debtor must follow the creditor, and if he makes a bargain with a person who is abroad at the time when the contract is made, which is the case here – and what makes this case stronger is, that it is made by a foreigner who is abroad, with a foreigner who is also abroad – the place of payment according to the contract follows the general rule, and is to be made where the creditor is.

At p. 134, Lindley LJ said:

> Where is the obligation to pay to be performed? The services were to be performed in English waters, and the vessel was to be taken to Southampton; but the contract is wholly silent as to where payment is to be made. Can this question be solved by any of those principles of law by which lawyers are guided? The answer is, "Yes." The person to pay is a German company; the person to whom payment is to be made is a German company; and the obligation to pay is to be performed in Germany. It appears to me that this conclusion is too plain for reasonable argument to the contrary.

and at pp. 136, 137, Bowen LJ said:

> The general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor.

In *Charles Duval & Co. v. Jans* [1904] 2 KB 685, Mathew LJ said, at p. 692:

> Where a contract like that in the present case is made with such a company, and no place of payment is specified therein, it appears to me that, in the absence of anything to the contrary, the intention may be inferred that the payment should be made to the company where its office is situated.

But, in this country we have s. 50 of the Contracts Act which says that if no place is specified for the performance of a promise, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at that place. Section 50 reads:

> 50. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at that place.
>
> ILLUSTRATION
>
> A undertakes to deliver a thousand gantangs of rice to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at that place.

In the present case, as no place had been specified for the performance of the statutory promise by the respondent to pay (s. 171 Contracts Act), his duty was to apply to the appellants to name a place for the payment to be made, and to pay it to them at that place (s. 50 Contracts Act). Section 50 does not mean that it is for the respondent to choose the venue for the payment to be made to the appellants. It is for the appellants to name the place where they want to be paid. Here the appellants have asked to be paid in Kuala Lumpur.

And to answer the question, where must the money (which the respondent is bound to pay to the appellants as money had and received under s. 171 of the Contracts Act) be paid? The answer is that where no place is specified it must be paid to the appellants at the place appointed by the appellants for the payment to be made, namely, at their firms address at Kuala Lumpur in Malaya.

The circumstances existing here in the present case is this. The appellants are practising lawyers in Kuala Lumpur, West Malaysia and the respondent who practices law in Sabah, East Malaysia had to pay to the appellants in Kuala Lumpur, West Malaysia. It is clear what the cause of action is: the action is brought under s. 171 of the Contracts Act for money had and received whereby the respondent was bound to pay over to the appellants in Kuala Lumpur all sums received on behalf of the appellants. There was therefore a cause of action for breach of an agency contract which was in Malaya, namely, that the money had not been paid over to the appellants at their office at Kuala Lumpur in Malaya.

Section 50 of the Contracts Act will also apply to the other cause of action in the third party notice, namely, on the respondent's failure to advise (if it can be shown at a trial that there was a promise or duty to give advice) the appellants of the obligation to pay the auctioneer's commission. This is how Mr Cecil Abraham put it in his affidavit (at p. 150 appeal record):

> 6.(b) similarly, the Third Party's breach of contract and/or breach of duty and/or negligence in failing to advise the Defendants of the obligation to pay an auctioneer's commission and its quantum in the sum of US$627,975.00 also occurred in Kuala Lumpur as such advice was to have been received by the Defendants in Kuala Lumpur;

It is for these reasons that my Lord Abu Mansor JCA and myself have allowed the appeal with costs here and below with the result that the application under O. 16 r. 6, RHC to set aside the third party notice is dismissed. In any case, all that the appellants need to show here is that there are triable issues and the appellants have an arguable case that their causes of action against the respondent arose within the local jurisdiction of the High Court in Malaya. We frown upon the use of the summary procedure under O. 16 r. 6 in the present case as a means to shut out the appellants completely from pursuing their legitimate remedy against the respondent without giving them an opportunity to have the issue on jurisdiction tried. The summary procedure should only be adopted in a plain and obvious case.

Abu Mansor Ali JCA:

The appellants/defendants appeal against the decision of the learned judge of the Kuala Lumpur High Court, given on 31 January 1996, dismissing with costs the appeal of the defendant to him against the order of the learned Deputy Registrar of the said High Court setting aside a third party notice issued to the third party respondent (third party). We heard lengthy arguments and also allowed counsel for both parties to submit written submissions. On 25 September 1997, we reserved our decision and on 29 September 1997 we

gave our judgment, by a majority of two to one, allowing the appeal with costs before us and below. The deposit was ordered to be refunded.

The facts of this case are as follows. The plaintiff is the United States of America. The defendants are a firm of advocates and solicitors under the style of Shearn Delamore & Co And Drew & Napier and the third party is Joseph Lee Henn Shen (Joseph Lee) a member of a firm of advocates and solicitors in Sabah called Messrs Joseph Lee & Co.

By a writ of summons dated 24 May 1994, the plaintiffs claimed against the defendants for a declaration that the defendants are liable and accountable to the plaintiffs for the unlawful or wrongful retention and misappropriation of the sum of RM1,350,595.20 by their sub-agent M/s Joseph Lee & Co. and for the refund of the said sum. There are also alternative claims and for costs and any further or other relief.

The partners of the defendants entered their appearance on 13 June 1994 and thereafter filed their defence and counterclaim on 28 June 1994.

A third party notice was issued to Joseph Lee on 22 June 1994 but by 16 September 1994, the defendants filed their summons-in-chambers *(ex parte)* to set aside that notice and applied for leave to issue another third party notice. This was allowed by the Deputy Registrar on 20 October 1994 (encl. 10). The third party then entered conditional appearance and applied to set aside the third party notice (encls. 11, 12, 13, 14, 15, 16, 16A, 1GB, 16C, 17, 18).

The Deputy Registrar in an order dated 13 February 1995, allowed the third party's application whereupon the order granting leave to issue third party notice was set aside with costs. The defendants appealed to the learned judge against that decision.

Tracing a little back into the history of this suit, the plaintiffs had appointed the appellants as their solicitors in respect of the arrest and foreclosure of two vessels in Labuan, Sabah, of which the plaintiffs were mortgagees. Because the appellants, as West Malaysian solicitors, have to be admitted to practice at the Bar of the States of Sabah and Sarawak, they appointed the third party, Mr. Joseph Lee, to act on behalf of the plaintiffs in the arrest and foreclosure and auction of the two vessels. The two vessels were eventually auctioned to the plaintiffs. The plaintiffs' complaint was that the appellants, as their solicitors, had failed to advise them that a 2½% auctioneer's commission was payable in the auction. Secondly, there was a sum of RM1,350,595.20 refunded by the Sheriff to the plaintiffs which Mr. Joseph Lee retained and had wrongfully failed to pay over or forward to them but had instead purported to appropriate the same towards the settling of his bill. The appellants have filed a defence and counterclaim to the plaintiffs' claim but have also sought

leave to issue third party proceedings against Mr. Joseph Lee for damages and an indemnity in the event the court should find that the appellants were agent of the plaintiffs and Mr. Joseph Lee an agent of the appellants.

The appellants raised several grounds of appeal but grounds No. 5 and 6 appear to be the most relevant and are as follows:

> 5. The learned Judge erred in law and in fact in dismissing the appeal of the appellant solely on the ground that, as the Third Party is an Advocate and Solicitor practising in Kota Kinabalu, Sabah and resides there, the High Court of Sabah and Sarawak is the only court which has jurisdiction in the Third Party proceedings.
>
> 6. The learned Judge erred in law and in fact in failing to hold that in the Third Party proceedings, the High Court of Malaya at Kuala Lumpur has concurrent jurisdiction as the High Court of Sabah and Sarawak and the mere fact that the High Court of Sabah and Sarawak has jurisdiction does not preclude the High Court of Malaya from having jurisdiction as well.

Mr. K. Anantham for the appellants contended that the High Court Judge failed to consider the relationship of the defendants and the third party and the ensuing duty of the third party. The third party had offered to be and had been accepted as agent by the appellants in Kuala Lumpur. By the same token when the third party had agreed to be agent the third party acknowledged the appellants as his principal.

Counsel submitted further that it is trite law that it is the duty of the agent third party to account and it is also his duty to pay over any sum received to the principal. If there is absence of any expressed provision as to place or mode of payment, then the general principle will apply that the agent must look for the principal and pay him which is Kuala Lumpur.

He referred us to the Supreme Court Practice 1991 at p. 4 of the appellants "Ikatan Otoriti Perayu" para (l)(e) under the heading:

Breach within the jurisdiction of a contract wherever made

> ... Where no place of payment is provided by the terms of the contract (including such as are to be implied from the course of dealing between the parties) it is the duty of the debtor to seek out his creditor at his residence or place of business, and therefore a failure to pay money due to a plaintiff who resides or carries on business within the jurisdiction falls within this sub-rule (*Robey v. Snaefell Co.* [1887] 20 QBD 152).

And at p. 6 of the "Ikatan Otoriti Perayu" the appellants' counsel cited para. 783 under the heading:

Payments made to agent for principal.

> All moneys received on the principal's behalf must be paid over or accounted for to the principal upon request ... Nor can the agent retain such moneys against the principal in respect of a debt due to himself from the person paying them, or because of some claim made to them by some third person. Failure to pay renders the agent liable to an action for money had and received.

Counsel further cited the Court of Appeal case of *Harsant v. Blaine, MacDonald and Company* [1887] 56 QBD 511 where the headnote of the case reads:

> A person who has received money as agent is bound not only to account for the same, but also to pay it over to his principal when requested so to do; and, in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over.

Counsel further cited the Court of Appeal case *Charles Duval & Co., Limited v. Gans And Another* [1904] 2 KB 685:

> Where, in an action for the price of goods sold by sellers in England to foreigners resident abroad, it appeared that, though the contract of sale did not expressly state where payment for the goods was to be made, the implication which, under the circumstances, reasonably arose from the contract was that it should be made in England:-
>
> Held, that leave to serve notice of the writ upon the defendants out of the jurisdiction was properly given.

Counsel submitted that on the facts of our present case and applying all the authorities he cited the breach or non payment by the third party of moneys due to the plaintiff occurred in Kuala Lumpur.

Appellants' counsel then referred to the claim of the plaintiff in para. 16 of their statement of claim wherein the plaintiff alleged that the appellants failed to advise them that the auctioneer was also legally entitled to 2½% sales commission (apart from the sheriff's commission of 2%) amounting to US627,975 (inclusive of outlays).

Appellants' counsel submitted that, as for the above claim, his submission on the failure to give advice is that the appellants' breach, if it is a breach, occurred in his office in Kuala Lumpur. The advice, if at all it needed to be given, would be given from this appellants' Kuala Lumpur office. Appellants' counsel cited *Distillers Co (Bio-Chemicals) Ltd v. Thomeson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694 where the Privy Council held

in that case the act complained of was the failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy ... It was this omission which gave rise to the cause of action which, therefore, arose within the jurisdiction.

Counsel submitted, as a whole having regard to the facts of the case, without taking and splitting the facts in parts the cause of action of the plaintiff simply is, I have suffered damage. He also submits that the cause of action use in Kuala Lumpur and carried to its conclusion must necessarily be including a cause of action between the appellants and the third party. As the money was to be paid into the appellants' account in Kuala Lumpur and not received the appellants' counsel contends the breach is clearly in Kuala Lumpur.

Mr. Sethu, the counsel for the respondent third party, on the other hand, submitted that the whole point of the case is the question of local jurisdiction. He submitted further the onus is on the appellants to establish the local jurisdiction and unless the jurisdiction is established, the local court could not proceed to hear the merits of the matter. Learned counsel cited the case of *Fung Beng Tiat v. Marid Construction Co.* [1996] 2 MLJ 413 where the Federal Court reiterated that the Federal Constitution provides for two High Courts in Malaysia – Malaya and there is the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory. In that appeal since the debtor was residing in Sabah a year preceding the presentation of the Bankruptcy Notice Sabah Courts assumes jurisdiction.

Learned counsel submitted that this present claim is between the plaintiff and the third party. He submitted that the relationship between the plaintiff and the third party in Sabah was that of solicitor and client and the appellants' role in the transaction was only one of intermediary.

Learned counsel pointed to para 3.1 of the statement of defence which provides as follows:

> 3.1 The said Joseph Lee was appointed with the express or implied authority or consent of the plaintiffs to act in his capacity as advocate and agent for and on behalf of the plaintiffs in Sabah in accordance with the laws applicable in Sabah and not as advocate or agent for the defendants.

And learned counsel also referred to para. 4.2.2. of the said statement of defence:

4.2.2. the defendants' role as intermediary for *inter alia* the payment of fees and disbursements, the onward transmission of instructions and advice between the plaintiffs and Joseph Lee who was the plaintiffs' advocate and agent in Sabah, the defendants were only responsible for assisting in the preparation, drafting and settling of the various documents and pleadings in the contemplated proceedings and to advise on matters pertaining to the facts and the law in so far as they related to admiralty matters as the relevant admiralty laws applicable to the plaintiffs' contemplated proceedings in Sabah are materially the same as the admiralty laws in West Malaysia.

Then counsel submitted as pleaded in para. 4.4 of the statement of defence is the true position of the third party as follows:

4.4 The defendants will contend that the plaintiffs were well aware and understood that the said Joseph Lee as the advocate and agent on record for the plaintiffs in Sabah was in fact wholly responsible for the commencement, conduct and prosecution of and for all other matters relating to the plaintiffs' said claims in Sabah including the enforcement of any orders obtained and the attendance to ancillary matters relating thereto.

And finally, the learned counsel referred us to para. 5.1 of the statement of defence as follows:

5.1 The said Joseph Lee was appointed to represent the plaintiffs as advocate and agent in Sabah by the defendants with the express or implied authority and consent of the plaintiffs.

Counsel for the respondent pointed out in the affidavit in support of the application for third party notice, the appellants stated in paras. 5(1) and 5(2) as follows:

5(1) he was at all material times the defendants' agent or sub-agent;

(2) in breach of his duties owed to the defendants as agent or sub-agent for the defendants and/or in breach of the terms expressed or implied in his retainer by the defendants he unlawfully or wrongfully retained and misappropriated the said sum of RM1,350,595.20 being monies belonging to the plaintiffs.

He concluded it was clear he submitted that the act of misappropriation took place in Sabah and the breach therefore was in Sabah. Learned counsel cited the case of *Lam Kok Trading Co. (Pte.) Ltd. & Anor. v. Yorkshire Switchgear & Engineering Co. Ltd.* [1976] 1 MLJ 239 where the application to set aside the writ of summons and all subsequent proceedings because the defendant did not reside and nowhere carried on business within the jurisdiction where the contract also occurred outside the jurisdiction.

The respondent's counsel submitted that the case he relied on was *Johnson v. Taylor Bros. & Company, Limited* [1920] AC 144, the headnote of which read as follows:

> Leave will not be granted under Order XI., r. 1(e), to a purchaser of goods under a c.i.f. contract from a foreign vendor to serve notice of a writ of summons on the vendor outside the jurisdiction in an action for breach of contract, where the essentials breach on which the action is founded is the failure to ship the goods at the foreign port, upon the allegation of the purchaser that the breach is the failure to tender shipping documents within the jurisdiction.
>
> Decision of the Court of Appeal reversed.

Respondent's counsel also complained that the third party notice obtained by the appellants ought to be set aside as the appellants, in the affidavit in support of the *ex parte* application, failed to disclose the following:

(a) the third party's solicitor's letter of 25 August 1994 exh. "AC-1" giving notice that the application for third party notice was received under protest and that the letter gave notice that their application was being challenged on the ground of improper forum; and

(b) that the appellants had filed a suit in Kota Kinabalu K22-162-94 on 29 September 1994 and the third party application hearing was fixed for 20 October 1994.

Counsel submitted that it is trite law that it is applicants' duty to disclose all material facts.

Mr. K. Anantham, in reply, said that it was true that, in the third party notice, the nature of the claim had been stated as it was just a notice to commence proceeding. It was within the discretion of the learned judge to grant or refuse leave. It was a fact that the applicant had to disclose the cause of action and it was also a fact that retaining and misappropriating was done in Sabah.

Regarding the Sabah writ, the writ in the action was served after the appellants lost before the Senior Assistant Registrar in Kuala Lumpur on 13 February 1995. As far as the Sabah writ was concerned, it was only a preventive action and it was served before the appeal was heard and pending appeal. In passing Mr. Anantham submitted that the case of J*ohnson v. Taylor Bros. & Company, Limited* was irrelevant since the giving of the documents within the jurisdiction was not relevant as the goods were never shipped.

We considered the submission of both counsel and we came to the conclusion that the appellants' counsel's submission was the more reasonable approach. The whole claim must be looked at in its entirety commencing with engagement of the appellants by the plaintiff. As the appellants is not admitted to practice in Sabah they employed the third party as their agent to conduct their work there.

We uphold the submission of appellants' counsel that it is the duty of the third party to account and pay the disputed sum to the appellants in Kuala Lumpur. The failure of the third party to pay over what ought to be accounted for resulted in the breach of the agency contract in Kuala Lumpur.

By the same token by a majority of two to one, we do not agree that the Sabah work of the third party should be looked at in isolation. This transaction must be looked at as a whole and we do not subscribe to the judge's judgment that the third party's work on behalf of the appellants be looked at as an independent action and that the third party is agent of the plaintiff and that the appellants is merely as an intermediary. To do so is to deny what is clear that it was the plaintiff who engaged the appellants and the appellants constituted the third party as their agent.

For reasons we stated above, we agree, to allow the appeal by a majority of two to one with costs before us and below.

Abdul Malek Ahmad JCA:

The factual framework of this appeal has been ably laid out by my learned brother Abu Mansor Ali, JCA in his judgment but it is still necessary for me to repeat some of the facts here for purposes of continuity. At the same time, my other learned brother NH Chan, JCA, as presiding judge, has carefully considered the legal intricacies in his well reasoned judgment. However, for the reasons stated hereafter, I am not able to come to the same conclusion as they have.

In their writ of summons and statement of claim dated 28 May 1994 filed in the High Court at Kuala Lumpur, the plaintiffs had pleaded that they were the mortgagees of the two vessels named "Jade Phoenix" and "Golden Phoenix' belonging to the Phoenix Bulkship Company I, Inc. and the Phoenix Bulkship Company II, Inc. respectively. Upon the default by the Phoenix companies in the performances of their obligations to the plaintiffs, the latter had sought to arrest and foreclose on the said vessels which were laid-up off the port of Labuan in Sabah in or before May 1985.

The defendants are a firm of advocates and solicitors practising in Kuala Lumpur and elsewhere in West Malaysia but all the partners and legal assistants are all admitted to practice law in the States of Malaya but have to obtain ad hoc admission to do so in the State of Sabah for any particular cause or matter.

The defendants were retained by the plaintiffs in May 1985 to act for them in proceedings to be commenced with respect and in connection with the said vessels. The defendants' retainer was upon the terms that they were only entitled to reasonable renumeration calculated on an hourly rate based upon the itemisation of the services rendered and time spent on the same.

As none of the members of the defendants were entitled to practise in the State of Sabah, the defendants advised the plaintiffs that it was necessary for the defendants to engage the services of a law firm or advocate and solicitor in the State of Sabah to be on record substantially for the purpose of filing the writs, pleadings and other documents in court and to accept service of such papers as would be served by the legal advisers of the Phoenix companies if they were to defend the anticipated proceedings.

On 4 June 1985, the defendants appointed the third party as their local advocate on record in the conduct of the proceedings and the plaintiffs were informed of the name and address of the third party by a telex from the defendants dated 9 January 1986.

It was the plaintiffs' understanding that the defendants were primarily responsible for the conduct of the contemplated proceedings and would carry out the substance of the work relating thereto including the drafting and settling of pleadings and any appearances in court which required argument as opposed to appearances of a formal nature.

The plaintiffs further pleaded that the third party was employed by and was the agent of and was in privity of contract with the defendants who instructed, liased and dealt with them. The third party looked to the defendants for the payment of its fees and disbursements and accordingly several of its interim bills were rendered to the defendants.

On 7 June 1985, Admiralty Suits in Rem No. 2 and No. 3 of 1985 were filed in the High Court of Borneo at Kota Kinabalu for foreclosure of the said vessels. The pleadings in the said suits were drafted and settled by the defendants on the instructions of the plaintiffs and filed by the third party as agent of the defendants.

The said vessels were eventually sold through a public auction pursuant to an order of sale on 26 January 1990. The said sale was conducted by and under the direction of the Sheriff. Both the vessels were successfully bidded for by the plaintiffs, as they were the sole bidders, at a credit bid of US$25.1 million.

At the request of the defendants, the plaintiffs forwarded to them remittances for US$506,351 and US$627,975 which the plaintiffs were informed was required as the Sheriff's commission and auctioneers' fees in respect of the auction sale.

The plaintiffs were not advised by the defendants until after the said sale that the auctioneer was also legally entitled to a sales commission of 2½ per cent amounting to U$627,975 inclusive of outlays. As a consequence, the plaintiffs were adversely prejudiced by the failure of the defendants to advise them both as to it being payable and as to its quantum, based as it was on the amount of the bid, in that had she plaintiffs been appropriately advised of the same, they would have altered their bidding strategy to avoid or reduce the amount of the auctioneer's commission.

Prior to 7 June 1990, the third party had rendered interim bills for work done based on reasonable renumeration for services which had been duly settled. These bills were not under the Sabah Solicitors' Renumeration Rules 1988 (hereinafter "the Sabah Rules').

By a bill dated 7 June 1990 addressed to the defendants, the third party purported to charge a sum of US$300,000 as fees for the services rendered. However, by another bill dated 23 March 1991 purportedly pursuant to the 13th Schedule to the Sabah Rules addressed both to the defendants and the plaintiffs, the third party purported to charge a sum of US$529,000 as fees for the services rendered. This was to supersede the earlier bill dated 7 June 1990. No payment was made by either the plaintiffs or the defendants as they disputed the amount.

By letter dated 2 October 1991 addressed to the defendants, the third party informed them that a sum of RM1,350,595.20 had been refunded being the amount overpaid as Sheriff's commission and purported to apply and set off this sum against the amount allegedly due to them. The plaintiffs contend that this sum of RM1,350,595.20 should be refunded to them. They further pleaded that the failure of the defendants to initiate and pursue actions for the recovery of the sum at RM1,350,595.20 unlawfully or wrongly detained by the third party or to indemnify the plaintiffs in respect of their loss demonstrates a lack of concern and disregard for the interests of the plaintiffs.

In consequence, the plaintiffs had sued the defendants for the misappropriation and unlawful retention by the third party as sub-agent of the defendants of the sum of RM1,350,595.20 or alternatively that the defendants are liable in damages or indemnity for the loss sustained by the plaintiffs by reason of the sub-agent's default and damages for the loss occasioned to the plaintiffs by reason of the breach of contract and negligence of the defendants in failing to advise the plaintiffs before the auction of the obligation to pay the auctioneer's commission and its quantum, further as an alternative for an order that the defendants do pay the plaintiffs the sum of USS627,975 and interest, costs, and any further or other relief.

It is now pertinent to look at para. 3.1 of the defendants' statement of defence dated 28 June 1994 which states:

> 3.1 The said Joseph Lee was appointed with the express or implied authority or consent of the Plaintiffs to act in his capacity as advocate and agent for and on behalf of the Plaintiffs in Sabah in accordance with the laws applicable in Sabah and not as advocate or agent for the Defendants.

It is also relevant to reproduce para. 4 of the statement of defence which reads:

> 4. Paragraph 8 of the Statement of Claim is denied.
>
> 4.1 The Defendants had made it clear that the Defendants could not practise as advocates in Sabah and thus could not lawfully represent the Plaintiffs in Sabah save for the possibility of an ad hoc admission for the right of audience given to a particular member of the Defendants to appear before a court of law in Sabah in the limited role as counsel appearing in a hearing in accordance with the law applicable there.
>
> 4.2 Accordingly it was expressed or implied or in any event understood that in so far as the Defendants' role or retainer was concerned and apart from:
>
> 4.2.1 any ad hoc admissions as aforesaid and
>
> 4.2.2 the Defendants' role as intermediary for *inter alia* the payment of fees and disbursements, the onward transmission of instructions and advice between the Plaintiffs and Joseph Lee who was the Plaintiffs' advocate and agent in Sabah, the Defendants were only responsible for assisting in the preparation, drafting and settling of the various documents and pleadings in the contemplated proceedings and to advise on matters pertaining to the facts and the law in so far as they related to admiralty matters as the relevant admiralty laws applicable to the Plaintiffs' contemplated proceedings in Sabah are materially the same as the admiralty laws in West Malaysia.

4.3 By reason of the Defendants' inability to lawfully represent or act for the Plaintiffs as advocates in Sabah in accordance with the laws applicable there, Joseph Lee was accordingly instructed to represent the Plaintiffs in Sabah as an advocate in Sabah to advise and to act for and in the name of the Plaintiffs in all matters pertaining to the Plaintiffs' claims in Sabah in accordance with the laws applicable in Sabah.

4.4 The Defendants will contend that the Plaintiffs were well aware and understood that the said Joseph Lee as the advocate and agent on record for the Plaintiffs in Sabah was in fact wholly responsible for the commencement, conduct and prosecution of and for all other matters relating to the Plaintiffs' said claims in Sabah including the enforcement of any orders obtained and the attendance to ancillary matters relating thereto.

In the alternative, the defendants had contended at para. 16 of the statement of defence that:

16.1 The Defendants will contend that the Plaintiffs had so represented and held out as aforesaid by reason *inter alia* of the following:

16.1.1 that the said Joseph Lee filed the said suits in the name of the Plaintiffs and was the advocate on record acting for and representing the Plaintiffs, with the full knowledge, authorisation and/or consent of the Plaintiffs;

16.1.2 that the said Joseph Lee filed all cause papers in and took all proceedings under the said suit in the name of and as advocate and agent acting for the Plaintiffs, with the full knowledge, authorisation and/or consent of the Plaintiffs;

16.1.3 that the said Joseph Lee filed and affirmed affidavits and acted and held himself out to be the advocate and agent acting for and on behalf of the Plaintiffs in Sabah in relation to the said suits and on matters ancillary thereto, with the full knowledge, authorisation and/or consent of the Plaintiffs;

16.1.4 that in respect of the said suits and in matters relating to the laws and practice applicable in Sabah the said Joseph Lee also rendered advice to the Plaintiffs from time to time and which advice the Defendants duly communicated to the Plaintiffs;

16.1.5 that the Plaintiffs with full knowledge enjoyed the benefit of the proceedings and orders obtained and carried out in the said suits by the said Joseph Lee acting as advocate and agent for the Plaintiffs; and

16.1.6 that the said Joseph Lee had also rendered invoices in the name of the Plaintiffs for his services in respect of the said suits and which invoices were paid by the Plaintiffs.

16.2 By reason of the matters aforesaid, the Plaintiffs are now estopped and precluded from denying or refusing to recognise the fact that the said Joseph Lee was at all material times the advocate and agent of the Plaintiffs and wholly responsible to the Plaintiffs in relation to the said suits and for all matters relating thereto in Sabah and/or from alleging as set out in the Statement of Claim that the said Joseph Lee was the agent or sub-agent for the Defendants, which allegation is denied.

For the work done, services rendered and monies paid by the defendants in relation to the said suit at the plaintiffs' request, the defendants rendered to the plaintiffs an invoice dated 5 December 1991 for RM162,600.45 which the plaintiffs had failed, neglected or refused to pay. Since the defendants have RM61,236.47 in the solicitors' trust account kept by the defendants for the plaintiffs, they are counterclaiming for the balance.

The third party had applied to set aside the third party notice taken out by the defendants and was successful when the Deputy Registrar granted the order in terms on 13 February 1995. The appeal to the High Court was dismissed on 31 January 1996. Hence this appeal by the defendants.

In his usual frank and forthright manner, K. Anantham of learned counsel for the appellants, the defendants in the court below, had submitted that the third party was the agent of the defendants and although the third party insists that they are entitled so set off monies received from the court, the defendants argue that the said monies must be returned to them as it was due to the third party's failure to advise on the entitlement of the auctioneer's commission.

He had then referred to s. 23(1) of the Courts of Judicature Act 1964 which provides:

23(1) Subject to the limitations contained in Article 128 of the Constitution of the High Court shall have jurisdiction to try all civil proceedings where -

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

They were relying particularly on paras (a) and (c). He said that since there was no specific provision for the mode and place of payment, the agent had to look for the principal and pay the money. He argued that the money must be paid in Kuala Lumpur as the defendants have no office elsewhere.

Even if the money was sent from or posted in Sabah, learned counsel added, the breach occurred in Kuala Lumpur as the money was not received. As for the claim in tort, the damage occurred in Kuala Lumpur. As between the plaintiffs and the defendants, the suit was in Kuala Lumpur. As between the defendants and the third party, the instructions from the former to the latter were by telephone and correspondence although one of their assistants did go to Sabah to instruct.

R.R. Sethu, in his customary firm and forceful fashion, relied heavily on the question of jurisdiction. He maintained that the third party, as the respondent and for whom he was acting, were the solicitors of the plaintiffs not the defendants and the funds came from the plaintiffs. The defendants' role was only as an intermediary and this, he added, had been clearly stated by the defendants in their statement of defence.

He was of the opinion that the action should have been filed in Sabah as the misappropriation alleged and the failure to advise took place there. Apart from that, he said, there was non-disclosure as the application for leave to issue the third party notice was made *ex parte*. He concluded by saying that the defendants had filed an action (K-22-162-1994) in Sabah on the same facts on 29 September 1994 before the third party hearing on 23 October 1994.

Learned counsel for the appellants promptly replied that the suit was filed in Sabah for practical reasons and the Sabah action was filed only after they were not successful in their case in Kuala Lumpur. As for the payment by the third party, he conceded that there was no specific provision and because of this, the general rule applies and that is the agent has to look for his principal to pay the money.

On a proper analysis of the pleadings, especially the statement of defence, and the affidavits, it is my finding that the third party is the solicitor for the plaintiffs not the defendants. The funds came from the plaintiffs and the defendants' role is basically one of intermediary. Accordingly, the plaintiffs should have filed the action in Sabah as the third party is an advocate and solicitor in Sabah, the admiralty actions the third party filed for the plaintiffs on the instructions of the defendants took place in Sabah, the refund of the deposit from the Sheriff and the set off for the fees due to the third party also occurred in Sabah, the alleged misappropriation took place in Sabah and in any case the third party was governed, as an advocate and solicitor, in which capacity he acted, by the Advocates Ordinance, Sabah.

Further, the defendants had conceded in para. 4.2.2 of the statement of defence, which had been reproduced earlier, that they were only acting as intermediary.

The arguments of learned counsel for the defendants really crumble to the ground in view of paras. 4.4, also reproduced earlier, and paras. 5.1, 5.2, 5.4, 5.5 and 5.6 of the statement of defence which are reproduced now:

> 5.1 The said Joseph Lee was appointed to represent the Plaintiffs as advocate and agent in Sabah by the Defendants with the express or implied authority and consent of the Plaintiffs.
>
> 5.2 The said Joseph Lee was appointed to represent the Plaintiffs in Sabah as aforesaid as the Plaintiffs were well aware that neither Cecil Abraham or any member of the Defendants were able so practise law in Sabah so as to be able to represent the Plaintiffs in the commencement, conduct or prosecution of the Plaintiffs' contemplated actions there save for the possibility of an ad hoc admission as stated in paragraph 4.1 above.
>
> 5.3 xxx
>
> 5.4 The Defendants were authorised by the Plaintiffs to give instructions to the said Joseph Lee, the Plaintiffs' appointed advocate and agent in Sabah and to liaise with him from time to time.
>
> 5.5 The said suits and all proceedings thereunder were commenced and undertaken on behalf and in the name of the Plaintiffs in Sabah by the said Joseph Lee and all cause papers and documents filed therein were filed by the said Joseph Lee as advocate acting for and representing the Plaintiffs and not the Defendants.
>
> 5.6 As regards the payment of the said Joseph Lee's fees and disbursements the Defendants merely acted as an intermediary for the collection and the payment of the fees and disbursements due from the Plaintiffs to the said Joseph Lee for his service as the advocate and agent for the Plaintiffs in Sabah.

The relevant excerpt of the third party notice dated 25 October 1994 states:

> The Defendant claims against you, Joseph Lee Henn Shen to be indemnified against the Plaintiff's claim and the costs of this action or contribution to the extent of the Plaintiff's claims including, further or in the alternative, compensation and/or damages on the grounds that:
>
> (1) you were at all material times the Defendants agent or sub-agent;
>
> (2) in breach of your duties owed to the Defendants as agent or sub-agent for the Defendants and/or in breach of the terms expressed or implied in your retainer by the Defendants you unlawfully or wrongfully retained and misappropriated the said sum of RM1,350,595.20 being monies belonging to the Plaintiffs; and/or

(3) in breach of your duty owed to the Defendants as agent or sub-agent for the Defendants and/or otherwise in breach of your duty of care owed to the Defendants either in law or upon an express or implied term of your retainer by the Defendants you negligently or otherwise wrongfully failed or neglected to advise the Defendants and/or the Plaintiffs before the auction more specifically referred to in the Statement of Claim of the obligation to pay an auctioneer's commission and its quantum amounting to a sum of US627,975.00 (inclusive of outlays).

It is crystal clear that the cause of action against the third party is the wrongful retention and misappropriation, and the failure to advise, and all these acts occurred in Sabah.

I now turn to the fact of non-disclosure when the defendants applied for leave to issue the third party notice. It was done *ex parte* the first time on 22 June 1994. On 16 September 1994 the defendants filed an *ex parte* summons in chambers to set aside the earlier third party notice and to get leave to issue a new one. This application was granted on 20 October 1994 by the Deputy Registrar and on 25 October 1994 the notice was filed against the third party. On 24 November 1994, it was served on the third party and on the following day, conditional appearance was entered.

In the exchange of affidavits, it is apparent that there has been a change of stance by the defendants. With regard to the claim by the defendants for indemnity or contribution from the third party, the defendants' affidavit dated 14 September 1994 states at para. 5(2):

5. The Defendants claim an indemnity or contribution from the said Joseph Lee Henn Shen by reason of the fact that:

(1) xxx

(2) in breach of his duties owed to the Defendants as agent or sub-agent for the Defendants and/or in breach of the terms expressed or implied in his retainer by the Defendants he unlawfully or wrongfully retained and misappropriated the said sum of RM1,350,595.20 being monies belonging to the Plaintiffs; and/or

(3) xxx.

However, in a subsequent affidavit dated 15 December 1994, para. 4(b) reads as follows:

4. I now crave leave of this Honourable court to refer to the Affidavit of the Third Party affirmed on the 26th August 1994 and affirmed herein in support of his "Summons To Set Aside or Stay Third Party Proceedings". In reply thereto, I state, firstly, that the Defendants had commenced third party proceedings claiming an indemnity or contribution from the Third Party based on the following

(a) xxx

(b) in breach of his duties owed to the Defendants as agent or sub-agent for the Defendants and/or in breach of the terms expressed or implied in his retainer by the Defendants, the Third Party had unlawfully or wrongfully retained and misappropriated the said sum of RM1,350,595.20 being monies belonging to the Plaintiffs **and failed to remit and pay over the said monies to the Defendants for onward transmission to the Plaintiffs**;.

The underlined words had been added in to emphasise that it is the failure to remit and pay the monies over to the defendants for onward transmission to the plaintiffs which is the basis of the application although in the earlier affidavit it is only the wrongful retention and misappropriation of the monies which made the third party responsible to the defendants.

As for the earlier affidavit, the acts complained of, namely wrongful retention and misappropriation, and the failure to advise, definitely occurred in Sabah but in the subsequent affidavit, it is the contention of learned counsel for the appellants that it is the third party, as agent, who must look for the defendants, as principals, in Kuala Lumpur to remit and pay over the monies for onward transmission to the plaintiffs. Since the addition of the words underlined would also make the question of jurisdiction an issue, I must refer to *The King v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex parte Princess Edmond De Polignac* [1917] 1 KB 486 where Viscount Reading CJ in the King's Bench Division said:

> Before I proceed to deal with the facts I desire to say this: Where an *ex parte* application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits.

A little later in his speech, he stated:

> It is said the applicant had no intention to deceive, first, because she stated the true facts in her second affidavit, and secondly, because her conclusion from those facts, however mistaken, was one which she really drew. As to the first contention, I am not impressed by a full disclosure deferred until the deponent's initial statement has been shown to be untrue. A full disclosure is more effective before than it is after the witness has been discredited.

The applicant there appealed. Lord Cozens Hardy MR in the Court of Appeal remarked at p. 505 that:

> That is merely one and perhaps rather a weight authority in favour of the general proposition which I think has been established, that on an *ex parte* application *uberrima fides* is required, and unless that can be established, if there is anything like deception practised on the court, the court ought not to go into the merits of the case, but simply say "We will not listen to your application because of what you have done.

On the following page, he said:

> It has been applied by this court, and certainly by the Courts below, to an application for leave to serve a writ out of the jurisdiction. If you make a statement which is false or conceal something which is relevant from the court, the court will discharge the order and say "You can come again if you like, but we will discharge this order, and we will apply the general rule of the court to applications like this." There are many cases in which the same principle would apply.

Scrutton LJ in the same appeal added:

> Now that rule giving a day to the Commissioners to show cause was obtained upon an *ex parte* application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure. One of the commonest cases is an *ex parte* injunction obtained either in the Chancery or the King's Bench Division. I find in 1849 Wigram V.C. in the case of *Castelli v. Cook* [1849] 7 Hare, 89, 94 stating the rule in this way: "A plaintiff applying *ex parte* comes (as it has been expressed) under a contract with the court that he will state the whole case fully and fairly to the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits, and that, as he has broken faith with the court, the injunction must go." The same thing is said in the case to which the Master of the Rolls has referred of *Dalglish v. Jarvie* 2 Mac. & G. 231. A similar point arises in applications made *ex parte* to serve writs out of jurisdiction, and I find in the case of *Republic of Peru v. Dreyfus Brothers & Co.* (55) LT 802, 803 Kay J stating the law in this way: "I have always maintained, and I think it most important to maintain most strictly, the rule that, in *ex parte* applications to this court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall

> hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this court the importance of dealing in good faith with the court when *ex parte* applications are made." A similar statement in a similar class of case is made by Farwell LJ in the case of The Hagen [1908] P. 180, 201: 'Inasmuch as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application.

On these considerations, it is my opinion that the subsequent affidavit by the defendants should be disregarded as it is obvious that the primary purpose of the additional words was to bolster up their case on the issue of jurisdiction. Since all the acts complained of occurred in Sabah, the plaintiffs should have cited the defendants as the first defendant and the third party as the second defendant and file the action in Sabah. Especially so when the defendants had averred in their affidavit dated 15 December 1994 that the facts and cause of action on which the third party proceedings are based are so inextricably connected with and form a part of the plaintiffs' action against the defendants that it is imperative that they should be tried and determined at the same time and by the same forum as the plaintiffs' action against the defendants.

Accordingly, I would dismiss the appeal with costs. The deposit is to go to the respondent to account of taxed costs.